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Elections--The Use of Certificates of Nomination

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from the present three year statute of limitations for nonsupport actions with respect to minor illegitimate children in West Virginia. It might therefore be reasonably argued in the future that the nonsupport statute and bastardy statute, when read together, deny certain illegitimate children equal protection of the laws.

David L. Core

Elections—The Use of Certificates of Nomination

Prior to the 1968 West Virginia primary election, the American Independent Party circulated a certificate of nomination, as prescribed by the West Virginia Code in an attempt to have the name of its presidential candidate appear on the ballot in the general election. Pursuant to the statutory provisions, the party filed these certificates with the Secretary of State of West Virginia. The Daily Gazette Company requested a list of these names in order to publish them in its newspaper. Apparently, its purpose in so doing was to discourage other voters from signing similar certificates circulated by the party. Upon the refusal of the Secretary of State to comply with this request, the Daily Gazette Company sought a writ of mandamus from the West Virginia Supreme Court of Appeals. *Held*, writ refused. The Legislature has provided by statute that those voters who sign a certificate of nomination shall not be allowed to vote in the next primary election to be held where a candidate for the same office is to be nominated. Even if the certificate is not a vote in its usual sense, it is so analogous to voting as to be entitled to the same consideration. The act of signing the certificate did not constitute a change of party registration. Even if it did, the Daily Gazette Company would still be denied the privilege of inspection because the object of their inspection was for an improper purpose. *State ex rel. Daily Gazette Co. v. Bailey*, 164 S.E.2d 414 (W. Va. 1968).

Normally, candidates for public office are nominated by primary election or party convention. However, as an alternate method of nomination, the certificate of nomination has been provided by statute in West Virginia.¹ In the *Daily Gazette* case the certificate was used to nominate a candidate for president. In subsequent litigation involving the certificate the West Virginia Supreme Court of Appeals

¹ W. VA. CODE ch. 3, art. 5, § 23 (Michie 1966).

was called upon to interpret these statutes. The three main questions raised by this procedure are: (1) does the certificate of nomination constitute a vote; (2) does the signing of the certificate constitute a change in voter registration; (3) is the certificate a public record, and if so, is it subject to public inspection. The answers to these questions will be of significance in the near future as minority groups seek to have their philosophies presented to the public and admitted to the elective process.

The specific right to vote is not guaranteed by the United States Constitution,² although it does provide that if the right is given by the State it will be protected under the fourteenth and fifteenth amendments.³ All states by constitution or statute have given the right of suffrage to qualified citizens. West Virginia has granted the right to vote in its constitution⁴ and has implemented it by statute.⁵

West Virginia requires by constitutional provision that voting in all elections be by ballot.⁶ This requirement is complemented by a statute providing that voting by ballot can be accomplished by the certificate of nomination.⁷ The inference that one's signature on the certificate is a vote is supported by the requirement in the statute that those voters who sign such certificate are prohibited from voting in the ensuing primary election.⁸

States generally provide by statute the methods by which candidates may be nominated for public office. Normally, political parties nominate their candidates either by convention⁹ or primary election.¹⁰ For those individuals not represented by a political party as defined by statute or who are so represented but are dissatisfied with the current leadership of the party, the method of nomination is by petition.

² *Pope v. Williams*, 193 U.S. 621 (1904). The specific right to vote is not guaranteed, but a republican form of government is guaranteed. U.S. Const. art. IV, § 4.

³ *Baker v. Carr*, 369 U.S. 186 (1962); *Gougar v. Timberlake*, 148 Ind. 38, 46, 46 N.E. 339, 341 (1897). *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1874).

⁴ W. VA. CONST. art. IV, § 1 (1872).

⁵ W. VA. CODE ch. 3 art. 1, § 3 (Michie 1966).

⁶ W. VA. CONST. art. IV, § 2 (1872). "In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed or secret ballot, as he may elect."

⁷ W. VA. CODE ch. 3, art. 1, § 4 (Michie 1966). "In all elections the mode of voting shall be by ballot . . . Voting by ballot may be accomplished as provided in articles three, four, five and six [§§ 3-3-1 to 3-6-12] of this chapter."

⁸ W. VA. CODE ch. 3, art. 5, § 23 (Michie 1966).

⁹ *Munsell v. Hennegan*, 182 Md. 15, 19, 31 A.2d 640, 642 (1943).

¹⁰ *Cunningham v. Cokely*, 79 W. Va. 60, 90 S.E. 546 (1916).

The requirements for nomination by petition vary among the different states;¹¹ nevertheless, certain requirements are commonly presented. The signatures of a specified number of qualified voters, plus statements of occupation, residence, and intention to support the candidate by the signatories are usually required. However, it has been held that statutes are unconstitutional which require a minimum number of signatures if such number is unduly burdensome.¹² Many of these statutes further provide that if the voter signing the petition voted in the preceding primary election in which a candidate was nominated for the same office, his signature will not be counted toward the required number of signatures needed to nominate the candidate.¹³

The West Virginia statute¹⁴ providing for a certificate of nomination requires the number of signatures of registered voters on the certificate to equal at least one per cent of the total votes cast for the office in the last general election at which a candidate for the same office was elected. However, this statute is different than that in most other states in that it requires such certificate to be filed at least one day before the primary,¹⁵ and it prohibits the voter who signs the certificate from voting in the ensuing primary election.¹⁶ This restriction applies to all voters who sign the certificate whether registered in a political party or not. This statute serves a legitimate purpose in its attempt to limit a voter to one vote for each office;¹⁷

¹¹ For the purposes of this paper a random survey of statutes from various state codes was taken to determine how they provide for this means of nomination. ARIZ. REV. STAT. § 16.601 (1956); CAL. ELEC. C. A. § 6830 (Derring 1961); CONN. STAT. ANN. ch. 153, § 9-456 (1958); COLO. REV. STAT. ch. 49, art. 7, § 1 (4) (1963); FLA. STAT. ANN. title 9, § 103.021 (1968); IDAHO CODE § 34-612C (Supp. 1967); ILL. ANN. STAT. ch. 46, § 10-4 (Supp. 1969); IND. ANN. STAT. § 29-3619 (Supp. 1968); IOWA CODE ANN. title 4, § 45.1 (1949); ANN. CODE OF MD. art. 33, § 67 (1967); N.Y. ELECTION LAW § 138 (6) (McKinney 1964); ANN. TEXAS STAT., ELECTION CODE, art. 13.50 (1967); REV. CODE WASH. ANN. § 29.24.040 (1965).

¹² *Williams v. Rhodes*, 393 U.S. 23, 36 (1968).

¹³ *E.g.*, ILL. ANNT. STAT. ch. 46, § 10-4 (Supp. 1969). "[A]ny person who has already voted at a primary election held to nominate . . . shall not be qualified to sign a petition of nomination for a candidate or candidates for the same office. . . ."

¹⁴ W. VA. CODE ch. 3, art. 5, § 23 (Michie 1966).

¹⁵ W. VA. CODE ch. 3, art. 5, § 24 (Michie 1966).

¹⁶ W. VA. CODE ch. 3, art. 5, § 23 (Michie 1966).

¹⁷ *Ladd v. Holmes*, 40 Or. 167, 66 P. 714 (1901). If one is allowed to vote more than once for one office, other voters are denied their adequate, proportionate share of influence, and the result is that the election, as to them, is unequal: that is, they are denied the equal influence to which they are entitled if some constituents vote by both certificate and ballot.

however, the manner by which it attempts to achieve this purpose may be questionable.¹⁸

Another issue raised by the signing of the certificate is whether it effected a change in the voter's party registration. In *Daily Gazette* both the majority opinion and the dissent agreed that such a signing did not change the voter's registration.¹⁹ The majority predicated this conclusion upon its interpretation of the West Virginia statutes relating to voter registration²⁰ and the method whereby it may be changed.²¹ This view is supported by a recent Arizona case²² in which it was held that when a candidate was nominated by petition by a group of citizens, this was not sufficient to effect a change in his registration or that of the voters who signed the petition.

The third issue raised in *Daily Gazette* was whether the certificate of nomination was in fact a public record. By determining that the certificate of nomination was entitled to the same considerations as a ballot, the court implied that it was not to be treated as a public record. However, the court further indicated that even if it were considered to be a public record, inspection could still be denied if it were for an improper purpose. Although there is a right to inspect public records, it is not an unlimited right.²³ The right to inspect will generally be denied if the object for the inspection is for an improper or illegitimate purpose. The court has held in a prior case that "[h]e who asserts that right must have some interest

¹⁸ This section of the statute may present a constitutional question in that it denies those voters who sign the certificate the right to cast their ballot for candidates to be nominated for other offices in the subsequent primary election. A survey procedures of other states' dealing with this method of nomination indicates that the voter is allowed to vote in the primary election but if he later signs a certificate of nomination, his name will not be counted on the certificate toward the required number. This result is achieved by allowing the certificate to be filed *after* the primary election. See note 11 *supra*. The West Virginia procedure requires the certificate to be filed *before* the primary election and prohibits anyone signing the certificate from voting in the primary. Those voters who are registered in a political party have met all requirements needed in order to vote in a primary election and the court in *Daily Gazette* held that by signing the certificate the voter did not effect a change in his voter registration; therefore that section of the statute which prohibits the voter from voting in the subsequent primary would seem to be a denial of the right to vote for the other offices.

¹⁹ *State ex rel. Daily Gazette Co. v. Bailey*, 164 S.E.2d 414, 417, 421 (W. Va. 1968).

²⁰ W. VA. CODE ch. 3, art. 2, § 22 (Michie 1966).

²¹ W. VA. CODE ch. 3, art. 2, §§ 27-30 (Michie 1966).

²² *Cavender v. Bd. of Supervisors of Pima County*, 333 P.2d 967 (Ariz. 1958).

²³ *State v. Harrison*, 130 W. Va. 246, 43 S.E.2d 214 (1947).

in the record of which he seeks inspection and the inspection must be for a legitimate purpose"²⁴ In *Daily Gazette* the court based its determination that the petitioner sought to inspect the certificate for an improper purpose upon petitioner's admitted purpose that it sought to publish the certificate in order to dissuade other voters from signing the certificate. The court reasoned that it is inherent in a free society that its members be able to nominate a candidate of their choice for political office, irrespective of who he is or what his philosophies are, without fear of embarrassment or intimidation from anyone, provided they do so in compliance with the law.²⁵

This case establishes the certificate of nomination as a valuable method whereby citizens of West Virginia can nominate candidates of their choice without relying exclusively on political parties. One can expect to see this method used more frequently in the future because of the emergence of new minority groups who wish to express their political views. This case is significant in setting a precedent which can be relied upon by persons seeking to employ the certificate of nomination to nominate candidates.

Ray Allen Byrd

Danny Lee Stickler

Federal Courts—Standard of Domicile in Diversity Cases

Infant plaintiff brought an action by next friend to surcharge the guardian of the infant's estate for mismanagement. The United States District Court for the Eastern District of North Carolina dismissed the action for want of diversity jurisdiction, and plaintiff appealed. *Held*, reversed and remanded. The question of the domicile of an infant plaintiff in a diversity action is determinable by federal common law rather than by the law of either of the states wherein the parties reside; and for purposes of determining diversity jurisdiction, infant plaintiff, who was born and raised in North Carolina, who lived in North Carolina in custody of the father after parent's divorce until father's death, and who thereafter lived in New Jersey with his mother and stepfather, who were domiciled there,

²⁴ *Id.* at 254, 43 S.E.2d at 218.

²⁵ *State ex rel. Daily Gazette Co. v. Bailey*, 164 S.E.2d 414, 419 (W. Va. 1968).